IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 77 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?
Nos. 1 and 3 to 5 No. No.2 Yes.

ASHOKKUMAR UTTAMCHAND SHAH

Versus

PATEL MOHMAD ASMAL CHANCHAD

Appearance:

MR JV DESAI for Petitioner

MR BHARAT J SHELAT for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision:26/03/98

ORAL JUDGEMENT

This is defendant's Second Appeal.

The brief facts are that on 2.5.1975 the plaintiff borrowed Rs.5,000/- from the defendant and kept six gold ornaments weighing 13.5 Tolas with the defendant for security of the amount as deposit or pledge or pawn. It is alleged that the defendant gave unsigned chit

giving details regarding the date of transaction, details of ornaments, weight, amount of advance and also the rate of interest as 2.5%. There was ambiguity in the rate of interest which was clarified by the defendant on inquiry from the plaintiff that due to good relation between the parties interest will be charged @ 2.5% p.a. It is further alleged that another sum of Rs.800/- was borrowed by the plaintiff from the defendant on 13.6.1975. He gave in security and pledged two gold ornaments weighing 6.5 tolas to the defendant. On the back of the same chit again similar unsigned details by the defendants were written as alleged by the plaintiff. In this way the plaintiff received Rs.5800/-. In all 8 gold ornaments weighing 20 tolas were pledged. On 7.5.1976 the defendant wrote a post card to the plaintiff that since the ornaments were not taken back and the loan was not repaid he had sold some of the ornaments weighing 7.25 tolas 2 annas remained in balance. It was also informed that in this way Rs.3675/remained due towards loan to be paid by the plaintiff. According to the plaintiff the defendant had no right to sell any of the ornaments pledge with him. Accordingly the suit for accounting was filed after serving notice.

The suit was contested by the defendant denying the transaction altogether. He also denied to have written any postcard to the plaintiff. Chits alleged to have been written by the defendant and the postcards allegedly written by the defendant were also denied. It was also pleaded that the suit was barred by limitation.

The Trial Court did not find any force in the plea that the suit was barred by limitation. It further found that the plaintiff succeeded in establishing his claim. Accordingly the decree for accounting was passed and in the preliminary decree itself, the Trial Court appointed the Commissioner to take accounts and submit report.

An appeal was preferred which was dismissed hence this Second Appeal.

Only question formulated in this appeal was :

"Whether the court can rely on its own comparision of the disputed signatures with those of the admitted ones without the assistance of experts evidence."

After hearing learned counsel for the Appellant at length and going though the judgment of the two Courts

below and the cases cited by the learned Counsel for the Appellant I am of the view that both the Courts below adopted erroneous approach of comparing admitted signature of the defendant on his written statement and Vakalatnama filed in the Trial Court as well as from the alleged handwriting of the defendant on the two post cards allegedly written by him with the disputed writing. Other evidence was also considered by the two Courts below but the question is whether the Court can compare the disputed and admitted hand writing or signatures without aid from the expert or without aid from the text book of the authorities on comparison of hand writing etc. The contention of the learned Counsel for the appellant has been that the approach of the two Courts below was totally erroneous and that it is not mentioned even in the judgment whether it was comparison by nacked eye or by magnifying glass or by some other scientific method or that the two Courts below while forming opinion about hand writing and signature considered any text book on handwriting and finger print comparison. He also placed reliance upon Division Bench verdict of this Court in S.M.Sharma Vs. South Gujarat University, 23 GLR Pg.233 at page 251. In this case several cases of the Supreme Court and the Privy Council have also been referred.

Section 73 of the Evidence Act expressly enables the Court to compare disputed writing with admitted or proved writings to ascertain whether writing is that of the person by whom it purports to have been written. The Supreme Court in Murarilal Vs. State of M.P., A.I.R.1980 SC 531 observed that the duty of the Court to compare the writings and to come to its own conclusion cannot be avoided by recourse to the statement that the Court is no expert. It is thus clear from the above observation of the Apex Court that under section 73 of the Evidence Act, the Court can compare the disputed and admitted hand writing or signature for coming to its own conclusion. However, provisions of section 73 of the Evidence Act, have been interpreted by various Courts as to how the signatures or hand writing are to be compared when there is no assistance from the expert.

In Kesarbhai vs. Jethabhai AIR 1928 PC 227 the Privy Council observed that "they would have thought it unsatisfactory and dangerous in any event to take decision in such a case as this on the correct determination of the genuineness of the signature by mere comparison with admitted signatures especially without the aid of evidence on microscopic enlargement or any expert advice." In this case Division Bench of the Bombay

High Court compared the disputed endorsement on cheque with the admitted signature and felt no doubt that the endorsement was genuine. The Privy Council, however came to a different conclusion and observed that it was unable to feel certainty which was expressed by Appellate Bench of the High Court. In Kishore Vs. Ganesh, AIR 1954 SC Pg.316 the Trial Court found that the signature on the letter was dissimilar to the admitted signature. On appeal, the High Court was of the view that there was no such dissimilarity. In view of these differences of opinions the Supreme Court observed that conclusions based on mere comparison of handwriting must, at best, be indecisive and yield to positive evidence in the case.

In State (Delhi Administration) Vs. Pali Ram, AIR 1979, SC 14, it was observed by the Apex Court that although there is no legal bar to the judge using his own eyes to compare the disputed writing with the admitted writing, even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution hesitate to base its findings with regard to the identity of handwriting which forms the sheetanchor of the prosecution-case against a person accused of an offence, solely on comparison made by himslef. It is, therefore, not advisable that a Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other; and the prudent course is to obtain the opinion and assistance of an expert.

In Murarilal Vs. State of M.P.(Supra) the Supreme Court again laid down guidelines for discharge of duty by Court in such cases and it observed that "where there are expert's opinions, they will aid the Court. Where there is none, the Court will have to seek guidance from some authoratative textbook and the Court's own experience and knowledge. But discharge it must, its plain duty, with or without expert, with or without other evidence."

From this and other decision it is clear that no doubt under section 73 of the Evidence Act, the Court is entitled to compare disputed and admitted signature and handwriting for coming to a conclusion but the rule of prudence and caution require that in the first place expert's opinion should be obtained for assistance and if such opinion is not available then the Judge presiding over the Court must disclose in the judgment his knowledge in the subject of comparison of handwriting or should mention that he has taken aid from some

authoratative text book. The Court should also mention whether the result of its comparison finds support from some evidence adduced by the parties may be in the shape of oral or documentary evidence or direct evidence. This is in short answer to the substantial question formulated in this Appeal.

However, this answer itself will not suffice for final disposal of the Second Appeal. If the judgments of the two Courts below are scrutinized with care and caution it is found that both the Courts below proceeded to decide the case on mere presumptions surmises and conjectures. It is no where mentioned in the two judgments whether the Courts below made comparison with nacked eye or with the help of magnifying glass or with the aid of some scientific mode of comparison.

Mere statement in the judgment that on comparison the disputed and admitted signatures are found to be of the same person is not enough and it cannot be said to be sound finding based on cogent and scientific reasons and data. Admittedly, the parties have not obtained expert's opinion. Even the Courts below did not direct the plaintiff to obtain report of his expert. There is nothing on record to show that the plaintiff was unable to manage the expenses for obtaining experts report. In the absence of expert opinion and expert report Court or Courts below should have taken into consideration other evidences on record. Admittedly and evidently there is no direct evidence to prove that the disputed writing on the chit and on its reverse is of the defendant. There is only solitary statement of the plaintiff who is highly interested witness. He has stated that writings on the chit and on its reverse were made in his presence by the defendant. If that is so, then it does not appeal to reason why the plaintiff did not insist that the defendant sholuld give his signature over chit and on its reverse portion. It is also not explained why no witness was taken by the plaintiff at the time of transaction. The plaintiff being highly interested witness could not be safely relied upon. The lower Appellate Court has observed that signature was not given by the defendant under the fear that he did not obtain certificate for carrying on his money lending business and in view of cordial relations between the parties the plaintiff waived signature of the defendant on the chit simply to oblige the defendant so that he may not face prosecution for carrying on business in money lending without registration of business and without obtaining certificate of registration. This approach of the lower Appellate Court is surely based on conjectures and not on

evidence. Hence this observation is liable to be ignored. Thus, no satisfactory explanation why the signature of the defendant was not obtained on the chit has been offered by the plaintiff.

The other oral evidence on record is no oral evidence to prove that the chit was written by the defendant in his own handwriting.

It may be mentioned that the approach of the two Courts below regarding comparison was also erroneous and strange. It is normally the disputed signature which is compared with admitted signature or specimen signature. In this case no specimen signature of the defendant was taken by the Courts. Admittedly, there is no signature of the defendant on the chit or on its reverse portion. There was then no occasion for comparison of defendant's signature from his admitted signature on written statement and vakalatnama. In absence of the signature of the defendant on the chit it can be said that actually there is no disputed signature and if this is so, it could not be compared with the admitted signature. There is thus fallacy in the approach of the two Courts below.

It is also needless to say that characteristic of handwriting of a person should have been taken into consideration and such characteristics cannot be determined with certainty simply with the aid of admitted signature. Instances are not rare where a person signs in one manner whereas his handwriting has different mode and appearance. It is only handwriting which could be compared with the disputed or admitted handwriting or specimen hand writing. Again there is nothing on record to show that specimen handwriting of the defendant was obtained for comparison with his alleged handwriting on the chit on its back. The two Courts below have taken recourse of comparison with the aid of two post cards written by the defendant to the plaintiff. These two post cards were denied by the defendant. Denial was express and not evasive. Not only handwriting but contents of the post card its posting and signatures were also denied by the defendant. There is no proof from the plaintiff's side that the handwriting of the postcard is actually of the defendant. The two Courts below found that because post cards were received by the plaintiff from the post office in ordinary course it can be believed that it was written by the defendant. There is hardly such presumption in the eyes of law. On the other hand when a letter is posted and sent through post the presumption is that if it is correctly addressed it reached the addressee. Beyond this no presumption in the

eye of law could be drawn regarding correctness and genuineness of the contents of such letter. Genuineness and contents of the letter have to be proved by a person relying upon it by by cogent and direct evidence. The plaintiff has not stated that in the usual course of things he used to receive letters from the defendant. He also did not state that two post cards were written by the defendant in his presence. As such on mere conjectures and surmises the writing on the pastcards could not be said to be admitted writing of the defendant. If this is so then so called admitted writing of the defendant on the two post cards could not be the basis for comparison of hand writing of the defendant on the disputed chit. Thus, in the absence of the specimen handwriting of the defendant and further in the absence of proof that two postcards were really written by the defendant, exercise of the two Courts below in making comparison of the writing on the postcards with the writing on the disputed chit was futile exercise and no opinion could be formed on such exercise that the chits were necessarily written in the handwriting of the defendant.

The lower Appellate Court has also relied upon the statement of hostile witness examined by the plaintiff. It is correct that the statement of hostile witness is not to be rejected as a whole simply on the ground that the witness is hostile. If some portion of the statement of hostile witness inspires confidence it can be relied upon. However, it should not be forgotten that hostile witness cannot be termed as wholly reliable witness. Hence the witness who is not wholly reliable cannot lend corroboration to the statement of the plaintiff who is highly interested in his cause. Mere statement that one of the witnesses tried to help the defendant is not enough.

In view of the foregoing discussions it can be concluded that the Courts below can rely on its own comparison of the disputed signatures and handwriting but in the case under consideration the Courts below have not taken into consideration the guidelines laid down by the Apex Court in the judgments referred in the foregoing portion of this judgment and the exercise undertaken by the two Courts below for comparison of handwriting and the signature of the defendant was a faulty exercise which could not yield any positive result and if on such exercise the suit was decreed and the appeal was dismissed both the Courts below have fallen in error. Accordingly, the appeal is bound to succeed.

However,it may be mentioned that mere success of appeal in peculiar facts and circumstances of the case is not enough for setting aside the judgment of the lower Appellate Court and the Trial Court and for dismissing the suit. From the material on record the judicial conscience requires that there should be a thorough inquiry about the respective contentions of the parties. It is, therefore, a fit case where the suit should be remanded to the Trial Court with a direction that it shall direct the plaintiff to obtain opinion of a qualified expert and after examining the expert the Trial Court shall give fresh decision on the disputed question relating to handwriting of the defendant on the disputed chit. If however, the plaintiff shows his inability to obtain expert report then the Trial Court shall with the help of magnifying glass compare the handwriting and shall insist upon the plaintiff to prove by direct evidence the handwriting of the defendant on the two post cards relied upon by him and then only fresh conclusion should be arrived at.

With the above observations and discussions the appeal is allowed. Judgments and decrees of the two Courts below are hereby set aside. The Civil Suit No.304 of 1978 is remanded to the Joint Civil Judge (JD), Bharuch for fresh decision in the light of the observations made in the body of the judgment. In the circumstances of the case cost of this appeal shall be borne by the parties.

Sd/-
(D.C.Srivastava,J)
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m.m.bhatt